

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
TOM DENOVAN,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB Nos. 83-215 and 83-219

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

This matter, the appeal of two Washington State Department of Ecology Reports of Examinations and Orders denying that permits be issued on Surface Water Applications No. S4-28016 and 23004 were consolidated and came before the Pollution Control Hearings Board for formal hearing on April 16, 1984, in Wenatchee, Washington. Seated for and as the Board was Lawrence J. Faulk, vice chairman (presiding). Gayle Rothrock, Chairman, has listened to the tapes and examined the exhibits. The proceedings were electronically recorded.

Appellant, Tom Denovan of Leavenworth, Washington, represented

1 himself. Respondent, Department of Ecology (DOE), was represented by  
2 Charles K. Douthwaite, Assistant Attorney General for DOE at Olympia,  
3 Washington.

4 Witnesses were sworn and testified. Exhibits were admitted and  
5 examined. Oral and written argument was taken into the record. From  
6 the testimony, evidence and argument the Board makes these

7 FINDINGS OF FACT

8 I

9 On April 13, 1971, appellant filed Application No. 23004 with DOE  
10 to appropriate public surface waters. On July 27, 1984, appellant  
11 filed Application No. S4-28016 to appropriate public surface waters.  
12 Public notices were made, and a protest to granting application 23004  
13 was received by DOE from Ed Palmquist during the 30-day protest period  
14 which ended on July 4, 1971. There were no protests received on  
15 Application No. S4-28016.

16 II

17 Application No. 23004 requested 0.16 cubic foot per second (cfs)  
18 from Clark Canyon Creek for irrigation of 2.5 acres. This water was  
19 to be used on appellant's parcel located in the W 1/2 SE 1/4 of the NE  
20 1/4 of Section 7, Chelan County.

21 Application No. S4-28016 requested .074 cubic foot per second  
22 (cfs) from Clark Canyon Creek for stockwatering and the irrigation of  
23 3.7 acres. This water was to be used on a parcel also owned by  
24 appellant which is located in the SE 1/4 of the NE 1/4 of Section 7,  
25 Chelan County.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB Nos. 83-215 & 83-219

1 During the summer months the parcels are rotated as grazing area  
2 for horses. Appellant's priorities of water use in this application  
3 were stockwatering and irrigation of pasture land for his horses.

### 4 III

5 Appellant's two parcels lie in Clark Canyon which supports a creek  
6 that flows year-round, and is a tributary to Chumstick Creek. There  
7 are no apparent existing rights to Clark Canyon Creek water. The area  
8 receives most of its moisture in the form of snowfall and from the  
9 springs located above the creek, which flow averages at 1.0 cfs.

### 10 IV

11 Pursuant to chapter 90.03 RCW, Chumstick Creek and its tributaries  
12 were adjudicated in a proceeding lasting from October 1977 to April  
13 1983, which adjudication has been appealed to the Superior Court of  
14 Chelan County. Average flow of the Chumstick Creek during normal  
15 years was found to range from 1.5 to 2.0 cfs. During years of  
16 unusually low precipitation, flows of less than 1.5 cfs occur and  
17 reaches of the Creek have gone dry because of existing irrigation  
18 diversions. Water rights were confirmed for the diversion of 7.65 cfs  
19 of surface water within the Chumstick Creek drainage area. Of that  
20 amount, rights were confirmed for the diversion of just over 4 cfs  
21 directly out of Chumstick Creek. Additionally a minimum flow of 0.10  
22 cfs was established for the reach of Chumstick Creek from its  
23 confluence with Little Chumstick Creek to its mouth. Appellant was  
24 confirmed a right to 10 GPM, 2 acre-feet per year from a 12 foot deep  
25 well dug for single domestic supply, but was denied a right for

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB Nos. 83-215 & 83-219

1 irrigation out of the Cummings Canyon Creek and the two unnamed  
2 springs located on his land.

3 V

4 On August 12, 13, 1984, representatives of DOE conducted a field  
5 investigation on appellant's parcels in order to determine whether to  
6 approve or deny his applications. Reports of examination were filed  
7 and approved by the Department's Regional Supervisor. The conclusions  
8 reached in the reports stated that during normal years, the creek's  
9 flow fluctuates to a flow less than what is needed to satisfy existing  
10 rights. The DOE determined that if the appellant's proposed uses were  
11 developed, they would have an adverse effect on existing rights and  
12 granting either permit would be contrary to the public interest.  
13 Application Nos. 23004 and S4-28016 were denied for irrigation.  
14 Appellant's application S4-28016 was approved for an instantaneous  
15 quantity of 0.01 cfs and an annual quantity of 1 acre foot per year  
16 for stockwatering.

17 VI

18 Feeling aggrieved by the decision of DOE, appellant filed an  
19 appeal with this Board on December 22, 1983, and the matter came to  
20 formal hearing.

21 VII

22 Any Conclusion of Law which should be deemed a Finding of Fact is  
23 hereby adopted as such.

24 From these Findings of Fact, the Board comes to these  
25

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB Nos. 83-215 & 83-219

1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over the persons and subject matter of  
4 this proceeding. RCW 43.21B.110.

5 II

6 This matter has come before this Board for a determination whether  
7 DOE was correct in denying appellant's applications to appropriate  
8 public surface waters for irrigation.

9 The legislature has found that, subject to existing rights, all  
10 waters within the state belong to the public and any right thereto  
11 shall be acquired by appropriation for a beneficial use and in the  
12 manner provided and not otherwise. As between appropriators, the  
13 first in time shall be the first in right. RCW 90.03.010.

14 III

15 Chapter 90.03 RCW deals with the appropriation of public surface  
16 waters. The application procedure for such appropriations is defined  
17 in RCW 90.03.250 through 90.03.340. Appellant has followed the proper  
18 procedure for both his applications.

19 IV

20 After the appellant applied for his permits, it was the duty of  
21 DOE to investigate the applications and determine what water, if any,  
22 was available for appropriation. RCW 90.03.290 provides in part:

23 But where there is no unappropriated water in the  
24 proposed source of supply, or where the proposed use  
25 conflicts with existing rights, or threatens to prove  
detrimental to the public interest, having due regard  
to the highest feasible development of the use of the

1 water belonging to the public, it shall be duty of  
2 the supervisor to reject such application and to  
3 refuse to issue the permit asked for.

4 The DOE concluded that if appellant's requested uses for  
5 irrigation were approved, they could impair existing rights and would  
6 be contrary to the public interest. This conclusion was based on  
7 DOE's belief that the proposed irrigation appropriations would reduce  
8 the contribution of Clark Canyon Creek to Chumstick Creek during  
9 periods of low flow.

10 V

11 A well could be located and constructed on the Denovan property  
12 which would provide water from the aquifer lying below the confining  
13 clay layer. Appellant argues that a well is not a practical  
14 alternative because of the expense and the softness of the terrain.  
15 WAC 173-545 requires pursuing an alternate source of irrigation water  
16 when it is available.

17 VI

18 Appellant stated that he would use the water on both of his  
19 parcels of land for irrigation.

20 RCW 90.03.010 provides that nothing contained in the Water Code  
21 (chapter 90.03 RCW) shall be construed to lessen, enlarge or modify  
22 the existing rights of any riparian owner. Consistent with this  
23 mandate, DOE, in addressing appellant's surface water application,  
24 concluded that the appellant could continue his riparian stockwater  
25 practice without the benefit of a permit or perfected water right.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB Nos. 83-215 & 83-219

VII

The minimum relief requested by appellant is for 0.13 cfs to irrigate his land with three sprinklers between April and July.

VIII

Appellant contends that confirmed water rights holders are not actually using the water that has been appropriated. DOE stated that this may be true. The Department plans to conduct a field analysis during the summer of 1984 to determine actual usage. This may result in instituting proceedings whereby rights could be relinquished due to non usage.

IX

Surface water is generally not available for further appropriation from the Chunstick Creek Drainage Basin since a minimum instream flow must be maintained under provisions of the Water Code and its implementing regulations, WAC 173-545.

X

Authorizing this appropriation would be detrimental to existing rights. There are senior rights upstream and downstream on Chunstick Creek which are dependent on the available flows for stockwatering and domestic uses.

XI

Issuance of a surface water permit here would be contrary to the public interest. The added stress on the resource of such a withdrawal during low flows is unnecessary when other reasonable alternate withdrawal and pumping methods are available. RCW 90.54 and WAC 545.

XII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The Washington State Department of Ecology denial of permit Application No. 23004 to appropriate surface water for irrigation is affirmed. The Department's approval of permit Application No. S4-28016 for appropriation of surface waters for stockwatering only is affirmed.

DONE this 8<sup>th</sup> day of May, 1984, at Lacey, Washington.

POLLUTION CONTROL HEARINGS BOARD

(See concurring opinion)  
LAWRENCE J. FAULK, Vice Chairman

Gayle Rothrock  
GAYLE ROTHROCK, Chairman



1 CONCURRING OPINION - FAULK

2  
3 I concur with the result but wish to preserve my thoughts  
4 concerning an alternate approach that would be more beneficial to the  
5 citizens.

6 DOE confirms that they are uncertain as to the water usage in  
7 Chumstick Creek Drainage Basin. The appellants indicated that the  
8 minimum relief sought was 0.13 cfs for irrigation April through July.

9 It seems to me that DOE should issue a temporary permit for  
10 appellant to utilize the water from Clark Canyon Creek this summer.  
11 If the analysis of actual usage shows there is water available for  
12 appropriation they they could finalize appellant's temporary permit.

13 If on the other hand, there is not adequate water to serve the  
14 confirmed water rights users, then DOE could regulate the water usage.

15 This seems to be a more reasonable and just approach.

16  
17  5/7/84  
18 LAWRENCE S. FAULK, Vice Chairman  
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